UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JAMES FREEMAN,

Petitioner,

-against-

ROBERT KUHLMAN, Superintendent,
Sullivan Correctional Facility,

Respondent.

----------X

96 CV 3749

MEMORANDUM
AND
ORDER

JAMES FREEMAN
88-B-1480
Box AG
Fallsburg, NY 12733-0116
petitioner pro se.

CHARLES J. HYNES
District Attorney, Kings County
(Roseann B. MacKechnie, Victor Barall,
Karol B. Mangum, of counsel)
for respondent.

NICKERSON, District Judge:

Petitioner pro se brought this proceeding for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent now moves to dismiss the petition as

clm

untimely, procedurally barred, and without merit.

I

After a trial in the Supreme Court, Kings County, a jury found petitioner guilty of murder in the second degree and criminal possession of a weapon in the second degree. On June 29, 1988 the court sentenced him to concurrent terms of twenty-two years to life for murder and five to fifteen years for weapon possession.

By counsel petitioner appealed his conviction arguing that (1) the form of the verdict sheet, which described in parentheses the elements of the crimes charged, denied him a fair trial, (2) the court imposed an excessive sentence, and (3) the trial court's response to a jury inquiry during deliberations deprived petitioner of due process of law. On June 25, 1990 the Appellate Division affirmed. People v. Freeman, 162 A.D.2d 704, 559 N.Y.S.2d 642 (2d Dep't 1990). The Appellate Division held that petitioner's first claim was unpreserved, and due to the overwhelming evidence of guilt, declined to review the

claim under its discretion. The Appellate Division held that petitioner's remaining contentions did not require reversal. On October 5, 1990 the New York Court of Appeals denied petitioner's application for leave to appeal. People v. Freeman, 564 N.E.2d 679, 76 N.Y.2d 939, 563 N.Y.S.2d 69 (1990).

On September 8, 1994 petitioner filed an application for a writ of error coram nobis claiming ineffective assistance of appellate counsel because (1) counsel failed to raise a Brady claim, and (2) counsel failed to raise the claim that the trial court erred by not giving a corroboration of accomplice testimony charge. On November 14, 1994 the Appellate Division denied the motion. People v. Freeman, 209 A.D.2d 540, 619 N.Y.S.2d 633 (2d Dep't 1994).

On January 24, 1995 petitioner moved in Supreme Court, Kings County, pursuant to New York Criminal Procedure Law § 440.10 to vacate his judgment of conviction claiming that (1) the form of the verdict sheet denied him a fair trial, and (2) counsel's

failure to object to the form of the verdict sheet denied him effective assistance of counsel. The Supreme Court, Kings County, denied the motion on February 22, 1996. The Appellate Division denied his application for leave to appeal on May 1, 1996. This petition followed.

Petitioner raises the following claims: (1) counsel's failure to object to the form of the verdict sheet at trial constituted ineffective assistance of counsel, (2) that appellate counsel's failure to raise a Brady violation, and his failure to raise the claim that the trial court erred by not giving a corroboration of accomplice testimony charge constituted ineffective assistance of appellate counsel, (3) that the trial court deprived petitioner of his right to a fair trial by submitting an improper verdict sheet, and (4) that the trial court's response to a jury inquiry during deliberations denied petitioner due process of law.

II

Respondent first seeks to have the petition dismissed as untimely under 28 U.S.C. § 2244(d)(1)(A). The Antiterrorism and Effective Death Penalty Act (the Act), Pub. L. No. 104-132, 110 Stat. 1214 (1996), amended 28 U.S.C. § 2244 to require that a habeas petition be filed no later than one year after the date on which a judgment of conviction becomes final. See 28 U.S.C. § 2244(d)(1)(A). The Act became effective on April 24, 1996. But a petitioner has a grace period of one year from the effective date of the Act to file a petition under 28 U.S.C. § 2254. See Ross v. Artuz, 1998 WL 400446, *7 (2d Cir. 1998).

Petitioner filed the petition on July 26, 1996, approximately three months after the effective date of the Act. The petition is timely.

III

The transcript of the trial shows that the prosecution offered testimony from which the jury could find the following facts. On June 18, 1987 at

approximately 5:30 p.m. Tonia Smith, John Kennedy, and several other friends went to Linden Park in Brooklyn, New York. Shortly thereafter, Jeffrey Smith, petitioner, and several other male friends arrived at the park.

Gregory Gopphine, also known as "Half-Pint", who had been at a nearby playground, came running into Linden Park looking for Jeffrey Smith and told Jeffrey Smith that Michael Middleton was in the other park. Apparently, Michael Middleton and Jeffrey Smith had a prior dispute. Gregory Gopphine, Jeffrey Smith, and several others ran to the playground, and a fight broke out. Several people joined in the fight and hit Michael Middleton while he was kneeling on the ground.

At that time, petitioner pulled out a gun and fired a shot into the air. Petitioner then shot again at Michael Middleton who was standing in a corner, but missed. As Michael Middleton ran out of the park onto Evergreen Avenue, petitioner chased him, firing the gun. Petitioner chased Michael Middleton up Evergreen

Avenue and shot him. Michael Middleton fell down at the corner of Evergreen Avenue and Linden Street, and petitioner fired a final shot, killing Michael Middleton.

Petitioner's first claim is that trial counsel's failure to object to the form of the verdict sheet constituted ineffective assistance of counsel. Following the charge to the jury, the trial court distributed a verdict sheet, which contained elements of the crimes charged. Count 1 read "Murder in the Second Degree (The Defendant Intentionally Caused the Death of Michael Middleton by Shooting Him)(On or About June 18, 1987)." Count 2 read "Criminal Possession of a Weapon in the Second Degree (The Defendant Knowingly and Unlawfully Possessed a Loaded Firearm with Intent to Use Unlawfully Against Another)(On or About June 18, 1987)." Count 3 read "Criminal Possession of a Weapon in the Third Degree (The Defendant Knowingly and Unlawfully Possessed a Loaded Firearm in a Place Other Than his Home or Place of Business)(On or About June

18, 1987)."

A petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court shall not be granted unless "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). Petitioner did not raise this claim in his direct appeal to the Appellate Division, failing to exhaust his state court remedies. Nevertheless, a petition "for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(2).

In order to establish ineffective assistance of counsel, petitioner must show that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that but for counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. See Strickland v. Washington, 466

U.S. 668, 688-696 (1984).

Trial counsel's decision not to object to the form of the verdict sheet fell within the realm of professional discretion. Furthermore, petitioner has not shown that the result of the proceedings would have been different. Petitioner's claim is without merit.

IV

Petitioner's second claim is that he received ineffective assistance of appellate counsel because counsel failed to raise a Brady claim, and a claim of court error by failing to give an accomplice corroboration charge.

During trial, the prosecutor discovered in a detective's file a handwritten report prepared by Detective O'Keeffe. The report stated that Jamal McNeil, an individual who allegedly witnessed the crime, made a statement that two other individuals named Jeffrey and Reality had also taken out guns during the crime. The prosecution did not call Jamal McNeil as a witness. Upon discovery of the report, the

prosecutor telephoned defense counsel and soon thereafter turned over a copy of the report.

In order to establish a Brady violation, petitioner must show that (1) the government failed to disclose favorable evidence, and (2) the undisclosed evidence was material. See United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995)(citing Brady v. Maryland 373 U.S. 83, 87 (1963)). The late disclosure of Brady material requires a new trial only where the defendant was deprived of a meaningful opportunity to use the material. See People v. Cortijo, 517 N.E.2d 1349, 1350, 70 N.Y.2d 868, 870, 523 N.Y.S.2d 463, 464 (1987).

The Strickland test applies to claims of ineffective assistance of appellate counsel as well as those involving trial counsel. See Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994). Counsel on appeal does not have a duty to advance every nonfrivolous argument that could have been made. See id. at 533. It is not sufficient for petitioner to show that counsel omitted a nonfrivolous argument. See id. But

ineffective assistance of appellate counsel may be shown if "counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." Id.

At the close of the government's case, the prosecutor turned over a copy of Detective O'Keeffe's report. The prosecutor offered to locate Jamal McNeil so that defense counsel could interview him and decide whether to call him as a witness. In addition, defense counsel could have recalled the government's witnesses to cross-examine them about the report or could have moved for a continuance. Defense counsel did none of these things.

Defense counsel had a meaningful opportunity to use the report. Appellate counsel's decision not to raise a Brady claim on appeal did not violate the Strickland standard.

Appellate counsel's decision not to raise a claim concerning the court's failure to give a corroboration of accomplice testimony charge did not violate the

Strickland standard. Trial counsel did not request the specific charge nor did he take exception to the final charge given to the jury, waiving the right to appeal. See New York Criminal Procedure Law § 470.05(2).

V

Petitioner's third claim is that the court submitted an improper verdict sheet denying him due process of law.

Where a state prisoner has defaulted his federal claims in state court pursuant to a state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and resulting prejudice, or demonstrate that failure to consider the claims would result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).

The Appellate Division specifically addressed petitioner's claim and held that it was unpreserved for appellate review pursuant to New York Criminal Procedure Law §470.05(2). In any event, petitioner did

not suffer prejudice as a result of the submission of the verdict sheet. Indeed, the wording in parentheses mirrored the oral charge to the jury.

VI

Petitioner's fourth claim is that the trial court's response to a jury inquiry during deliberation denied petitioner due process of law. Specifically, he argues that the court chastised the jury, gave an unbalanced instruction, stressing that the prosecution did not need to produce a weapon, and that the tenor of the instruction inhibited further inquiry by the jury.

During deliberations the jurors wrote a note that said "Can we have the answer to the following question: One, was there a gun found at the scene of the crime or on the defendant's person?"

The court responded to the note as follows:

> On the second message you asked for a gun found at the scene of the crime on the defendant's person (sic).
>
> I guess you weren't listening to me when I told you it wasn't necessary for the People to produce a gun if you believed beyond a reasonable doubt that the gun was used.

> Didn't I tell you that? Well, it looks like the question is self explanatory. Do you recall my telling you that?
>
> Then this question should never have been asked. There is no evidence that has been presented at this trial at all about a gun being found.
>
> The only evidence you received in this trial is about somebody claiming they saw a gun, is that correct?
>
> So then the answer to your question is absolutely no. What you see is what you get. That is it. So the question really should not have been asked.
>
> That is why I told you it wasn't necessary for the People to produce the gun because no gun was produced in evidence.
>
> Now, does that answer your question? Do you have anymore questions? Ask me now. Ask me the questions you want to know right now. Don't be embarrassed about asking questions. Ask them.

In order to obtain a writ of habeas corpus in federal court on the ground of error in a state court's instructions to the jury on matters of state law, the petitioner must show that the instruction misstated state law and that the error violated a right guaranteed by federal law. See Sams v. Walker, 18 F.3d

167, 169 (2d Cir. 1994).

In its response the trial court reminded the jury that they had already been instructed on the issue of the gun and restated that it need not be produced if they believed beyond a reasonable doubt that a gun was used. The court then asked the jury if they had any additional questions and informed them that they should not be embarrassed to make further inquiries. The supplemental instruction was proper. Accordingly, petitioner is not entitled to relief on his claim that the instruction denied him due process.

The petition is denied. A certificate of appealability will not be issued because petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253; Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996).

So ordered.

Dated: Brooklyn, New York
August , 1998

Eugene H. Nickerson, U.S.D.J.